



NEW AMERICA
FOUNDATION

August 27, 2012

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Notice of Oral *Ex Parte* Presentation
ET Docket No. 04-186 (Unlicensed Operation in the TV Broadcast Bands)
WT Docket No. 12-70 (Service Rules for AWS-4 in 2000-2020 and 2180-2200)
WT Docket No. 12-69 (Promoting Interoperability in 700 MHz Spectrum)
WT Docket No. 10-4 (Signal Booster Rules to Improve Wireless Coverage)

Dear Ms. Dortch:

On August 23, 2012, Michael Calabrese and Sarah Morris of the New America Foundation, Parul Desai of Consumers Union, John Bergmayer of Public Knowledge, and Matthew Wood of Free Press met as representatives of the Public Interest Spectrum Coalition (PISC) with Zachary Katz, Chief of Staff, and Renee Wentzler, Legal Adviser to the Chairman. The PISC representatives addressed a number of different proceedings, as referenced above.

Concerning the ongoing, unlicensed use of the so-called TV band White Space spectrum, the PISC representatives asserted the view that the scope and substance of the forthcoming incentive auction NPRM should make the continued nationwide availability of a substantial amount of unlicensed access in the current TV bands a priority. The advocates noted that the spectrum legislation enacted last February reflected a conscious compromise that included an expectation that the Commission would mitigate the loss of unlicensed spectrum access due to a reallocation for auction by designating any duplex gap and/or guard bands for unlicensed access under rules that would be complementary to the current TV White Space rules. The PISC representatives emphasized the importance of maintaining national markets for TV band unlicensed chips, equipment and applications – and their concomitant concern that TV band repacking could preclude the availability of unlicensed in a few of the very largest metro markets unless the Commission adopts affirmative measures as part of the incentive auction rulemaking.

In addition to the need for a clear affirmation that the duplex gap and guard bands resulting from a repurposing and re-banding of upper UHF channels will be designated for unlicensed use, the advocates also suggested that the Commission consider other measures to optimize the repacking of the band not only for broadcast incumbents and an auction, but also for unlicensed use by the public. One option mentioned was to reconsider certain overly-restrictive protections in the 2008 White Space rules, such as the mechanical drawing of protection contours for broadcast stations that ignore topography and whether any over-the-air television viewing would actually be impacted by the low-power unlicensed use of a channel in a discrete geographic area. The representatives also noted that the repacking process should affirmatively take into consideration that fixed-access use of TV White Space, which is what WISPs and other rural broadband providers need to better reach underserved areas, can only occur where there are three consecutive vacant channels whereas, in contrast, personal/portable devices are only permitted to operate above Channel 20. In both cases, if and when broadcast stations are relocated, or secondary broadcast stations considered for reassignment, it will be critical for the Commission to have an affirmative policy to optimize the repacking process to ensure continued robust unlicensed access for rural broadband and personal/portable uses. The advocates also stated the view that the Commission should consider channel sharing for secondary broadcast licensees and that the TV Bands Database should permit unlicensed use of channels that are not actually in use for substantial broadcast service.

Concerning the Commission's proposed assignment of new AWS-4 terrestrial mobile service licenses to the incumbent 2 GHz MSS licensee, which incorporates a permanent waiver of the ATC "integrated services" rule that has restricted flexible use of MSS spectrum (both the S band and the L band) for terrestrial-only deployments, the PISC representatives reiterated the argument in their Comments and Reply Comments that a number of public interest obligations should be imposed in exchange for the multi-billion dollar value of this flexible, terrestrial spectrum grant. The PISC representatives observed that, as documented in their Comments filed in the proceeding, Wall Street analysts have estimated the incremental net value of the proposed AWS-4 license grants to be on the order of \$4 to \$6 billion. The advocates reiterated their view that the Commission should follow the precedent it set in response to essentially the same request for MSS license transfers and a limited waiver of the integrated service rules granted to LightSquared Subsidiary LLC ("LightSquared") in 2009 and 2010, respectively. LightSquared compensated the public for the grant of valuable spectrum rights by agreeing to a series of compelling public interest obligations that included deployment of a wholesale-only LTE network, rapid buildout requirements, and a requirement to seek Commission approval for any sale or leasing of more than 25 percent of the network's capacity in an economic market area to one of the two largest terrestrial carriers by market share. In multiple filings, the same PISC

groups attending this meeting have stated that these obligations were appropriate and likely to promote competition, innovation, consumer choice and rural coverage.¹

In response to questions from the Chairman's staff concerning proposals to move the AWS-4 band at 2000 MHz up 5 MHz, to 2005-2025 MHz, the PISC representatives believe this is far more likely to harm than to serve the public interest. First, relocating the band will cause potentially extensive delay in the buildout and market entry of a new competitive wireless service provider, thereby undermining the Commission's justification for awarding terrestrial broadband rights without an auction. The 3GPP process of standardizing Band 23 around a globally-harmonized 2000-2020 MHz allocation, approved in June 2011, took nearly 18 months and would need to be repeated. According to a DISH Network filing, most manufacturers will not develop a chipset prior to completion of the 3GPP standardization process.² Second, DISH maintains that moving the band up 5 MHz to 2025 would result in substantial interference from government satellite systems that operate in the band immediately adjacent to 2025. Finally, the benefits of adding 5 MHz to future H Band auction appear remote and hypothetical in comparison to the immediate delay and possible loss of a market entrant. The PISC representatives maintain that the public interest is best served by both expediting and conditioning the buildout of the entire 40 MHz that is the subject of this proceeding in a manner that will promote more wireless competition with minimal delay.

The PISC representatives asserted that the assignment of these valuable AWS-4 licenses without an auction should be subject to four specific public interest conditions that could recoup value for the public, while also promoting wireless industry competition, innovation and spectrum efficiency, particularly in rural areas.

First, for the duration of the initial license period, the AWS-4 licensee should make up to 50 percent of its capacity available in each Economic Area for open wholesale leasing, or for roaming by other carriers, on a non-discriminatory basis at fair and reasonable rates.

Second, whether or not the AWS-4 licensee is required to make up to 50 percent of its capacity available for wholesale leasing and roaming, the Commission should require that the licensee seek Commission approval before making more than 25 percent of the licensee's data traffic capacity within any Economic Area available to any single carrier, or to any other entity,

¹ See Comments of Free Press, Media Access Project, New America Foundation and Public Knowledge, *In the Matter of LightSquared LLC Request for Modification of its Authority for an Ancillary Terrestrial Component*, Order and Authorization, SAT-MOD-20101118-00239 (Dec. 9, 2010); Public Interest Organizations, Consolidated Opposition to Applications for Review and Petition for Reconsideration, *In the Matter of LightSquared LLC Request for Modification of its Authority for an Ancillary Terrestrial Component*, SAT-MOD-20101118-00239 (Mar. 14, 2011), at 7.

² DISH Network Corporation, Ex Parte Presentation in WT Docket No. 12-70, *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, August 21, 2012.

regardless of whether that capacity is accessed on a wholesale basis, roaming basis, under a spectrum manager lease arrangement, or as part of a network sharing agreement. The PISC representatives noted that there was no need to limit the trigger on this approval to the two largest terrestrial carriers, as the Commission did in the *SkyTerra* license transfer noted above.

Third, any buildout requirements should be augmented by a “use it or share it” license condition that would permit other parties to make use of unused AWS-4 spectrum on a localized basis until such time as the licensee actually deploys service. There appears to be no reason to limit use of the TV Bands Databases to the TV band alone, as such databases likewise could be used to regulate contingent access to fallow portions of other bands including the S Band.³ While temporary local use of fallow spectrum may not have been practical as recently as last year, the Commission’s ongoing certification of geolocation databases to govern opportunistic and conditional access by frequency-hopping radios to vacant TV channels makes this entirely feasible. At a minimum, the 20 MHz being acquired from DBSD is apparently fallow spectrum and is likely to remain so for many years under the modest, population-based buildout requirements proposed in the Commission’s NPRM.

Fourth, the Commission should impose unjust enrichment penalties on sale of the AWS-4 licenses to either of the two largest mobile carriers. This penalty could be modeled on the rules governing the clawback of benefits reserved for designated entity licensees (DEs). This condition would prevent DISH from unjustly realizing a windfall if it transfers or assigns the spectrum to one of the two largest CMRS and wireless data carriers within a specified number of years.

With respect to the Lower 700 MHz interoperability proceeding, the PISC representatives urged a rapid completion of the proceeding and summarized briefly a few of the points made in their Comments and Reply Comments. The PISC representatives emphasized that any failure to ensure interoperability and roaming across the 700 MHz band would be a radical departure from long held FCC competition policy, dating back to the original PCS auctions, that ensured interoperability as new bands were auctioned. The advocates noted that the Commission has clear authority to mandate interoperability as a license condition and to modify licenses under Section 316 at any time subject to a finding it would “promote the public interest, convenience and necessity.” Without interoperability, competitive carriers that are A Block licensees would face enormous additional obstacles to deploying LTE and acquiring popular devices in an economic fashion. The advocates pointed out that it was A Block licensees’ – and the Commission’s – reasonable expectation that Band Class 12, introduced *prior to* Auction 73, would govern the Lower 700 MHz Band spectrum. Only post-auction, because of AT&T’s bad-faith effort to leverage its influence over 3GPP to minimize its own risk of interference and

³ See Comments of the Public Interest Spectrum Coalition, In the Matter of Promoting More Efficient Use of Spectrum Through Dynamic Spectrum Use Technologies, ET Docket No. 10-237 (Feb. 28, 2011). See also Michael Calabrese, “Use it or Share it: Unlocking the Vast Wasteland of Fallow Spectrum,” Working Paper, presented at 39th Research Conference on Communication, Information and Internet Policy (TPRC), September 25, 2011.

undermine competitive carriers, was a proprietary Band Class 17 was created at AT&T's behest, undermining a history of CMRS interoperability.

Finally, although the meeting did not include discussion of the Signal Booster proceeding referenced above, the PISC representatives are concerned that the Wireless Bureau may be reconsidering the pro-consumer approach to authorizing the use of non-interfering signal boosters that the Commission proposed in its NPRM. The New America Foundation and Public Knowledge filed comments in July, 2011, which conveyed the view that the licensing-by-rule approach proposed in the Commission's NPRM, under section 307(e), is the most practical approach that would also ensure the greatest benefit for consumers by promoting competition and innovation in both the market for signal booster peripherals and among ISPs.

The PISC representatives believe that consumers, booster manufacturers and smaller, regional and rural carriers would be harmed by a booster market controlled in any way by the dominant carrier duopoly. Because the boosters that are most valuable and desired by consumers are carrier-agnostic, they automatically and simultaneously amplify most carrier signals. In that case, it would be a fiction for the Commission to maintain that the authority for a consumer to transmit *on a variety of different carrier frequencies* can derive from the license assigned to a carrier for one of those frequencies. Licensing-by-rule – subject to certification of the device's compliance with a technical safe harbor that would avoid harmful interference – would best conform to the principles of the Communication Act and also yield the lowest transaction costs.

Respectfully submitted,

/s/

Michael Calabrese
Director, Wireless Future Project
Open Technology Institute
New America Foundation